

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Certain Wireless Service Interruptions

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GN Docket #12-52

May 30, 2012

**Reply Comments of Colin G. Gallagher  
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1. Replying to Comment of Michael D. Bell

[[ <http://apps.fcc.gov/ecfs/comment/view?id=6017030437> ]] received by the Commission 4/16/2012; posted 4/16/2012: In reply to the comment of Michael D. Bell and the Texas Department of Criminal Justice, which opined that "use of wireless service managed access by a governmental actor should be allowed in a correctional setting and that wireless service carriers should assist in these efforts for the purpose of ensuring public safety," concerns exist for both safety and rights of persons who are not in a State or other prison system, and among the questions that come to mind are whether such a managed access that claims to be able to exercise control over devices specific to a system internal to a prison, would be used outside of prison walls. The example comes to mind of mandated releases of prisoners by the U.S. Supreme Court in the State of California from the Brown v. Plata decision, due to what were determined by the Court to be unacceptable prison conditions. Increasingly, imprisonment within one's own home will be used by government entities especially in highly populated states as imprisonment for low-level offenses (and attendant overcrowding) continues. An immediate concern, therefore, is whether governmental actors will attempt to use managed access systems to limit or deny the use of people's own cellular devices in their own homes, regardless of whether or not they are considered to be within the custody of, or imprisoned by, a governmental authority, and regardless of whether those devices are on the managed access network. Such limiting or denial of service should not be allowed to occur. Another concern is for the safety and rights of those who live within prison walls specifically, as it is completely unknown what guidelines would be used and exercised with the managed access solutions, and what would constitute a "threshold" or "emergency" in the eyes of someone managing a prison, that would justify cutting off access to a cellular device on such a managed access system. It was stated in the TDCJ comment that "(t)he wireless service managed access system is designed to only interrupt wireless service within the physical perimeter of the correctional facility for contraband wireless devices." Yet technically, any device within close proximity to a managed access system would be considered to be a contraband wireless device, regardless of who owns it, and it does not take a stretch of the imagination to consider that in such wireless service managed access systems, the desire of the

operators of the system will ultimately be to limit or deny access to prisoners' devices on the system. It would seem that if such a system is intended to function, it should allow all the devices to work that are registered and known to the persons who guard the prison system so that the devices can be used by the prisoners in the event of an emergency, but should not be designed to cut off people's access to communication at the whim of those who manage a prison system. If the Texas Department of Justice does not feel that such a system can work without allowing its managers absolute discretion over the circumstances in which a shutdown should occur, it would seem that, at minimum, the technology inherent to the managed access system is in fact faulty, and should not be used.

2. Replying to Comment of APCO [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032580> ]] received by the

Commission 4/27/12 and posted 4/27/2012: In reply to the comment of APCO, the Association of Public-Safety Communications Officials-International, Inc., in this reply comment there is concurrence with a portion of APCO's "principal concern" (which) "is that any such disruption that may be appropriate under relevant law and policy," but there is not concurrence with the emphasis which was primarily upon avoiding "disruption of (i) the public's ability to call 9-1-1 for emergency assistance; (ii) the ability of government officials themselves to utilize CMRS; or (iii) mission-critical public safety radio communications that may be operating on radio frequencies in spectrum adjacent to CMRS frequencies." Rather, the emphasis should be upon ensuring people's rights and ability to communicate are not violated, and, as with the situations witnessed during the events of 9/11, people will, when provided the means and the ability to communicate, be the best resource to each other and to governments in times of difficulty. If the sole emphasis is upon avoiding disruption of 9-1-1, or CMAS, for example, then it will become increasingly difficult to avoid arrival at a point where governmental disruptions of communication service are routine.

3. Replying to Comment of California Public Utilities Commission

[[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032811> ]] received by the FCC 4/30/2012; posted 4/30/2012: In reply to the comment of the California Public Utilities Commission (CPUC), there are problems with many parts of this comment. Firstly, its title is misleading.

Titled "COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA," this communicates that the people of the State of California have somehow made comments via the position of the CPUC. This is not only wrong on its face, but as we see from reading the comment of the CPUC, its comment in no way reflects the position of the people of the State of California (not of the CPUC) who submitted comments into this proceeding.

The CPUC stated in its comment that "while the FCC has plenary jurisdiction over wireless carriers, it does not have jurisdiction over a state or local governmental or law enforcement agency's ability to determine what action is necessary to address immediate threats to public safety." This position is flawed. The CPUC went so far as to state "Determinations about the appropriate circumstances that may warrant an interruption of service for public safety, as well as the procedures used to effect such interruption, constitute exercise of state police powers over which the FCC has no jurisdiction." There is simply no legal basis for the CPUC's position.

In point of fact, in the decision which the CPUC relied upon most heavily in making its position (Goldin, et al. v. Public Utilities Commission, et al., 23 Cal.3d 638 (1979)), a case which focused

on commercial circumstances in which illegal activity could have been introduced (and in which the "petitioner's telephone service was used during the period in question "directly and indirectly, to assist in the violation of the law"), it is stated that "our scrutiny of rule 31 and its application in particular cases will not end with this decision, but for the present we are convinced that, subject to the observations we have made above, it "effects a constitutional accommodation of the conflicting interests of the parties." (Mitchell v. W. T. Grant Co., supra, 416 U.S. 600, 607 [40 L.Ed.2d 406, 413].)" Notably, this case did not assess or anticipate how to address a situation where governmental actors, claiming to act under the color of the law and supposedly for a public safety interest, shut down the ability of anyone on an entire network to communicate with each other, where the governmental actor's intentions were later revealed to suppress an active protest. (These are the circumstances that have led to this proceeding, from what we have witnessed in the situation specific to San Francisco and the actions of the San Francisco Bay Area Rapid Transit District.) Yet, this is not so much about the constitutionality of rule 31 and the approach of the California Supreme Court to utilizing a probable cause standard, as it is in this particular element of this reply comment about the failure of the CPUC to understand the interrelated, and valid, roles and functions of both PUCs and the FCC in helping to prevent network shutdowns from occurring. The CPUC cited various sections of California Public and Utility Code as well as California Business and Professions Code. However, interestingly, the CPUC did not include within its citations of Code, California Civil Code Section 52.1, et. seq. (quoted below in part):

"(a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars (\$25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.(...)

(d) If a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to subdivision (a) or (b), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE."

It is interesting that the California Public Utilities Commission has so vigorously asserted its legal ability as a Commission to take part in approvals of the type of conduct exercised by the San Francisco Bay Area Rapid Transit District, yet has failed to contemplate that the laws of the State, including the Constitution of the State of California, clearly limit in the modern context the kind of go-it-alone actions and attitude that the CPUC seems to be bent on pursuing. In point of fact, the very probable cause standard which the CPUC appears to be arguing in favor of for any potential future cell phone shutoffs, is by itself insufficient to protect the public from harm from governmental actors who would (again, in the future) abuse such a standard to suppress public expression, using denial of service or the threat of the same as a form of coercion of many members of the public in direct violation of the laws of the State. In fact, as we have seen recently in Chicago, there is evidence of selective cellular and wireless internet shutoff by a governmental entity that impacted not only independent journalists, but as well, standard media organizations, whose connection to the network was throttled and ultimately cut off during the NATO protests, based on nothing more than probable cause standards being indiscriminately used to restrict the Constitutional freedom of the press. Throttling should be understood to be a violation of the Communications Act of 1934 and Telecommunications Act of 1996 as well. (This yet-to-be investigated matter appears to have impacted more than journalists.) It should be obvious that a ruling from the FCC is necessary to provide clarity, context, and direction, to prevent such things from happening.

For guidance on where the local and state police powers are superseded by federal statute, we should look primarily to the Communications Act of 1934, which has been mentioned extensively by various persons who filed comment with the FCC during the comment period for this proceeding. We can also look to the rule establishing this proceeding as a permit-but-disclose proceeding, at 47 C.F.R. §§ 1.1200(a), 1.1206. et seq., which contain references to Commission pre-emption of "state or local" regulatory authority. There is no question that the Federal Communications Commission has the legal ability to issue a ruling and to exercise pre-emption of State or local authorities. This does not mean that the California Public Utilities Commission or other similar PUCs should not have a role in oversight of matters raised by this proceeding. In point of fact, history bears out that the California PUC has a strong role; we look at *People v. Brophy* as an example in which the California PUC (then referred to as the 'railroad commission') was shown by the Court to have a strong regulatory role.

As was pointed out by the Court,

"The people of California, through the adoption of section 23 of article XII of the Constitution, have seen fit to repose such power to supervise and regulate public utilities, which include telephone companies, solely and alone in the railroad commission, which governmental agency is clothed with such power of supervision and regulation as the legislature may confer upon it. As declared by the cited constitutional section, "the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

The CPUC comment states that "A state's police powers are not considered to be superseded by a federal statute unless that is the "clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.*, 221 U.S. 218, 230 (1947).)" We note that in the U.S. Supreme Court it was stated that:

“Congress meant to confer "broad authority" on the Commission (H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1 (1934)), so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." (FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)). To that end, Congress subjected to regulation **"all interstate and foreign communication by wire or radio."** (U.S. Supreme Court, FCC vs. Midwest Video Corp., No. 77-1575 (1979)) (Notably, this case was decided April 2, 1979, *after* the decision date on Goldin, et al. v Public Utilities Commission, et al., 23 Cal.3d 638 (1979).)

It was also demonstrated by the court in *People v. Brophy* (**49 Cal.App.2d 15 (1942)**) that: "Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands. Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, does not make the telephone company a violator of the criminal laws. If such were the case, the telephone company would likewise be guilty in permitting its facilities to be used in transmitting information to the newspapers of the country as to prospective horse races or prize fights, because the information thus transmitted and published induced or enabled persons to engage unlawfully in betting on the results of such contests. The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense, or because the officers of such company were aware of the fact that the passengers were intent upon visiting a bookmaking establishment upon arrival at their destination, which establishment was maintained for the purpose of unlawfully receiving bets on horse races."

Finally, the CPUC claims that "As Congress has expressly invited states to regulate aspects of rail safety, the FCC cannot preempt CPUC rules or regulations that govern rail safety." This claim is patently ridiculous. If this were the case, any state could create rules, regulations, or laws governing rail safety, which would be the purview of its PUC, in a manner which would preclude the ability of federal oversight on wireless communication provided within the area of the rail, as an example. The State of California, and other states remain subject to the Communications Act of 1934, the Telecommunications Act of 1996, and other laws, and this includes the potential for federal pre-emption in areas including those rights-of-way served by rail.

#### 4. Replying to Comment of Triple

Dragon [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032836> ]] received by the FCC 4/30/2012, posted 4/30/2012: This reply commenter concurs with the description by Triple Dragon in its comment of wireless services as

"the new leafletting, the new form of assembly, the new congregation"

It is suggested that in an instance where lives of people are directly threatened by actors it is not in the public interest to shut down a network, although specifically in reply to a portion of Triple Dragon's comment that suggests a solution should "isolate and deny service to only the wireless devices that pose the threat, leaving the service to innocent devices intact," it is thought that such a limited approach is certainly a better idea than the notion of a general network shutdown

of any kind, yet there must still be judicial review of a decision to do so, and the instances should all be published in which such a power has been exercised and how many people are actually affected. The danger of using such a solution is that it may end up being considered incrementally more and more justifiable, therefore the threshold considered acceptable for the use of such a solution may, in the end, become lower and lower, as designated by law enforcement agencies, rather than a higher bar. And what shall this bar or threshold be? We do not know. There should be no blanket ability to use even a more limited power (such as denying service only to a limited number of wireless devices).

5. Reply to Comment by Access [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032838> ]] Received by the FCC 4/30/2012, posted 4/30/2012: This reply commenter concurs generally with the Comment by Access and its Telco Action Plan (annex to comment). [[ <http://apps.fcc.gov/ecfs/document/view?id=7021914705> ]]

6. Reply to Comment by Colin G. Gallagher [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017031316> ]] Received by the FCC 4/20/2012, posted 4/20/2012: As this was the comment of this particular reply commenter, this reply comment expresses concurrence with the Comment by Colin G. Gallagher and with the Ex Parte presentation of Colin G. Gallagher received by the FCC on 3/30/2012 (posted 4/02/2012) at: [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017027782> ]]

7. Reply to Comment by AASHTO Special Committee on Wireless Communications Technology

[[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032865> ]] Received by the FCC 4/30/2012, posted 5/01/2012: This reply commenter thanks the AASHTO Special Committee on Wireless Communications Technology for its comment. This reply comment in part replies to the AASHTO Special Committee's sense that protocols would be best to adopt. It is submitted here via this reply comment that the best avenue for adopting a protocol at the Commission level should be done through an FCC ruling.

8. Reply to Comment by CTIA [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032875> ]] Received by the FCC 4/30/2012, posted 5/01/2012: This reply commenter, and many others, fundamentally disagree with the comment submitted by the CTIA, which stated that it is "not necessary for the FCC to undertake a substantive proceeding on these issues at this time." The CTIA claims that existing protocols such as SOP 303, being in place, essentially make it unnecessary to "expend(...) resources on developing new policies that could possibly create confusion and delay(...)" At this stage, it is felt that anyone who does not recognize the need for a Federal Communications Commission ruling that will expressly be designed to protect the rights of users of networks, while providing clarity on issues of common carrier questions raised and how local and state governmental entities shall approach the issue of wireless shutdowns, is in a state of denial. The issue is ripe not only for discussion in this proceeding, but it is in the public interest for a ruling to be issued. *[CTIA is the industry body that prevented the FCC from passing regulations that would require a common technical basis for cell phones. They are generally against the FCC making any ruling or regulation that would restrict their ability to operate without oversight.]*

9. Reply to Comment by Emma Llanso / Center for Democracy and Technology [[ <http://apps.fcc.gov/ecfs/comment/view?id=6017032940> ]] Received by the FCC 4/30/2012, posted 5/01/2012: This reply commenter concurs generally with the comment by Emma Llanso /

Center for Democracy & Technology, titled on the comment document as follows:  
"COMMENTS OF PUBLIC KNOWLEDGE, CENTER FOR DEMOCRACY & TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, BENTON FOUNDATION, FREE PRESS, MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, NATIONAL HISPANIC MEDIA COALITION, AND OPEN TECHNOLOGY INSTITUTE AT THE NEW AMERICA FOUNDATION"

10. Reply to Comment by San Francisco Bay Area Rapid Transit District / Grace Crunican [[  
<http://apps.fcc.gov/ecfs/comment/view?id=6017032867> ]] Received by the FCC 4/30/2012,  
posted 5/01/2012: San Francisco Bay Area Rapid Transit District's (SFBART's) comment is  
entirely inadequate and does not address the questions and issues raised by this proceeding.

SFBART's policy does not provide guidance for the Board,  
its employees, or agents, to seek an order from the Federal Communications Commission, a state  
commission of appropriate jurisdiction, or a court of law with appropriate jurisdiction prior to  
any modification or discontinuance sought, and thus the policy is entirely inadequate. SFBART,  
and other entities that claim to exercise police authority, must abide by the Communications Act  
of 1934 among other laws, accept their full duty as common carriers if providing wireless  
service, and both accept and implement rulings of the FCC.

SFBART has been operating outside of the realm of the law and the policy it has presented in its  
comment is not a solution to this problem.